COURTROOM EVIDENCE

Juvenile Defense Lawyer Seminar
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A hearing determining parent rights . . . shall be tried to a jury. . . .

I. INTRODUCTORY PRINCIPLES

A. Evidence Defined

Evidence is information: oral (testimony) and things ... like scars and documents (exhibits).

B. Rules of Evidence

1. Purpose: to govern the flow of information
2. Types of rules
   a. Housekeeping
      i. Order of presentation: direct examination, cross-examination, redirect examination
      ii. Objections
      iii. Types of questions, such as "leading"
      iv. Witness rules
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      iii. Preponderance, clear and convincing, beyond reasonable doubt
      iv. First-hand knowledge & perception, hearsay *EvRule, 602, 801 et seq.*
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      vi. Relevance *EvRule 401 et seq.*
      vii. Leading questions *EvRule 611*
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      ix. Judicial Notice

c. Tie-breakers

i. Burden of proof

ii. Presumptions manifesting policy rules

(1) intoxication from blood-alcohol reading

(2) paternity

iii. Presumptions applying inferences

(1) mail goes through

(2) paternity

d. Protections/Policies

i. privileges

ii. remedial measures

iii. character evidence

iv. "other crime" evidence

C. Sources of Reference

1. Udall, Livermore, Escher & McIlvain, *[Arizona] Law of Evidence* (3rd Ed. 1991)

2. *Arizona Rules of Evidence* - Desk Book from West Pub. Co., or A.R.S. Vol. 17A (paperback supplement)

D. Evidence Rules Apply In All Arizona Courts

1. The rules "govern proceedings in courts in the State of Arizona...", *Evidence Rules 101, 103, 104, 1101*, including criminal cases "except as otherwise provided." *CrimRule 19.3(a).6*

2. Exceptions:

a. Evidentiary questions of admissibility. *Evidence Rule 104(a)*

b. Reports required by Title 8. A.R.S. 8-537

c. Civil traffic hearings, A.R.S. 28-1076(C)

d. Small claims hearings, A.R.S. 22-516

e. Special cases, like criminal preliminary hearings, *CrimRule 5.4(c)*, and grand juries, *Evidence Rule 1101(d)*.

f. Privileges override evidentiary rules of admissibility. *Evidence Rule 1101(c).*

3. Objection must be timely made; judge doesn't block bad evidence. We are dealing primarily with a "purifying" process; admission of "impure" information ain't the end of the world. *EvRule 103*

4. Note *Evidence Rule 611*, which provides for "**Control by the Court**" to enhance "ascertainment of the truth" while avoiding undue time consumption and witness harassment.

II. GENERAL PRINCIPLES

A. Definitions

1. *Burden of Proof*

a. Tie-breaker: what it takes to move the court off dead-center.

b. Civil cases: "preponderance of the evidence;" the weight of the evidence shows one version of the story to be more probable than the other; the scales are tipped.

c. Civil cases, **including determining parental rights (ARS 8-537)**: "clear and convincing evidence;" this measures the quality, not the weight of the evidence, and requires it be quite persuasive, though *not* "beyond reasonable doubt". See *State v. Renforth*, 155 Ariz. 385, 388, 746 P.2d 1315 (CA 1, 1987), the jury must find the facts to be "highly probable."

d. Criminal cases: "beyond reasonable doubt;" this measures the effect of the evidence on the mind of the trier of fact (judge or jury) and requires removal of all doubt based upon reason and rational thinking (not emotion or sympathy). Recently, however, the Supreme Court has added a subjective element, that if the juror is "firmly convinced that the defendant is guilty [the juror] must find [the defendant] guilty."[1]

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[1] *State v. Portillo* and *State v. Tercero*, 182 Ariz 592, 898 P.2d 970 (1095):

> The state has the burden of proving the defendant guilty beyond a reasonable doubt. In civil cases, it is only necessary to prove that a fact is more likely true than not or that its truth is highly probable. In criminal cases such as this, the state's proof must be more powerful than that. It must be beyond a reasonable doubt.
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> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him/her guilty. If, on the other hand, you think there is a

e. Burden of proof in special situations:

(1) Motion to suppress evidence claimed to be illegally obtained (search & seizure, wiretap, voluntariness of confession or admission, identification of defendant), ArizCrimR 16.2:

(a) If a suppression issue is validly raised, the State must prove admissibility by a *preponderance* of the evidence.

(b) In three instances, the defendant must produce "evidence of specific circumstances which establish a prima facie case that the evidence taken should be suppressed" to raise suppression issues. The three instances:

i Where defendant has Rule 15 discovery;
ii Where defense counsel was present at the taking; and
iii Where the evidence was taken pursuant to a valid search warrant.

(2) Court or jury's findings with respect to termination of parental rights shall be based upon clear and convincing evidence. ARS 8-537

(3) Prior bad acts as substantive evidence (not merely to impeach a witness); that defendant committed them must be proved by clear and convincing evidence. *State v. Terrazas*, 189 Ariz. 580, 944 P.2d 1194 (1997). **See discussion of prior bad acts of parents as substantive evidence of their ability to parent, ARS 8-533(B), below.**

(4) *Miranda* v. voluntariness. Burden on state: Preponderance. *Miranda* (though it speaks in "voluntariness" terms) is analytically a *consent* case. *Jackson v. Denno* requires the court hold a hearing to determine whether the defendant's statement was knowingly, intelligently and voluntarily made; this includes whether defendant "consented" to waive his rights

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real possibility that he/she is not guilty, you must give him/her the benefit of the doubt and find him/her not guilty.

This instruction offers at least two problems: (1) It presumes the jury understands the two civil burdens, and knows that reasonable doubt is "more powerful than *that*." (2) Being "firmly convinced" is a subjective standard, not objective.

JDH suggestion, rejected by Justice Feldman:

> The state must prove the defendant guilty beyond a reasonable doubt. The term "reasonable doubt" means a doubt based upon reason. A doubt based upon "reason" is a doubt which you believe exists after an objective[, rational, reasoned, intellectual, clinical, dispassionate] evaluation of the evidence. It is *not* a mere imaginary doubt or a merely possible doubt. It is *not* a doubt based upon emotion, passion, prejudice or bias.

within the meaning of *Miranda*.[2]

(5) Mixed burdens:

i *E.g.*, defendant charged with (a) Driving While Intoxicated on Suspended License (criminal); and (b) speeding (civil); evidence rules not applicable in civil, but will be used in the combined trial, because they are used in the criminal trial. Burden of proof: jury decides the DWI "beyond reasonable doubt," judge decides speeding "by preponderance."

ii *E.g.*, defendant charged with committing a crime and in doing so, violating Term One of his probation. Counsel may agree that the court decide the probation question on the same evidence presented to a jury. Jury uses "reasonable doubt," judge uses "preponderance." (This is so even with separate hearings.)

(6) Preliminary hearing: "If it appears from the evidence that there is probable cause to believe that an offense has been committed and that the defendant committed it ...". *Criminal Rule 5.4(a)*.

2. *Direct evidence*: a direct assertion that a fact occurred, as by an eye-witness. *Example*: "I saw Jones walk on the beach," offered to prove that Jones did in fact walk on the beach.

3. *Circumstantial evidence*: Information which, with the aid of logic and common experience, raises an inference that a fact occurred. *Example*: "I saw a footprint in the sand on the beach. I found sand on Jones's shoes. I tried Jones's shoes in the footprint and they fit perfectly." Inference: Jones walked on the beach.

4. *Demonstrative evidence*: Usually a type of exhibit which does not provide substantive information but is useful to illustrate or demonstrate the meaning of substantive evidence. Typical: blackboard drawing of an intersection.

5. *Inference*: a fact which one deduces from applying logic and common experience to other facts (see "circumstantial evidence," above).

a. Some inferences are commonly taken, such as that when a letter, properly stamped, is mailed, it is received by its addressee.

b. Other inferences commonly taken are disallowed, such as that if a person has a criminal record, he probably did the crime with which he is now charged. Here, a policy overrides the logic.

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[2] See EvRule 104(c,d), that hearings on admissibility of "confessions" must be out of jury's presence, and that defendant's testimony is such hearing is not a general waiver of 5th amendment privilege.

6. *Presumption*: "A mandatory inference." That is, a policy that upon presentation of certain information, a given inference will always result. Sometimes the inference may be defeated, sometimes not.

   a. *Example*: If a driver's blood alcohol reading is .10% or greater, it is presumed the driver was under the influence of alcohol.

   b. *Example*: If a married woman gives birth to a child, it is presumed her husband was the father of the child.

7. *Stipulation*: an agreement or contract. It takes two to tango, so if one party says, "I stipulate," there is no "stipulation" unless the other party *accepts* the fact stipulated.

8. *Probative*: having some logical, or intellectual value. Information which will logically assist the trier of fact in deciding an issue of fact.

9. *Credible*: believable

10. *Impeachment*: tending to show lack of believability

11. *Competent*: legally admissible; *i.e.*, the rules of evidence allow the trier of fact to consider the information.

B. Housekeeping Rules

1. Raising evidentiary issues: motion or objection

   a. Motion must be timely:

      (1) *In limine* (i.e., "at the threshold", before the evidence is offered); or

      (2) After testimony has been given; but only if the testimony was *both* inadmissible *and* unexpected because the answer was nonresponsive. The motion is "to strike" and "to instruct the jury to disregard the nonresponsive answer." *E.g.*, *State v. Willoughby*: Q: Did Dan know about the insurance? A: Oh, I'm sure he knew.

   b. Objection must be timely: before the objectionable answer is given.

      Similarly, if objection is to competence of an expert, it must be made before the expert testifies. *Estate of Reinen v. Northern AZ Orthopedics, Ltd.*, 314 Ariz. Adv. Rep. 9 (Spm Ct 1/5/00), noting that an objection made at any time that enables the court to grant effective relief may be timely, but one delayed for tactical purposes will be deemed waived.

   c. "Pulling the Sting" may result in waiver of objection. *Brown v. USF&G Co.*, 277 Ariz. Adv. Rep. 27 (CA1 9/10/98). Plaintiff Brown, a homeowner, sued USF&G for its non-payment of fire coverage; USF&G's defense was arson.

      (1) Plaintiff Brown filed a pre-trial motion in limine to exclude the fact that Brown had refused a polygraph test. Motion denied, not on the merits, but because *untimely*. Brown made a tactical decision not to object at trial

(which he could have done), instead himself introduced the evidence, "pulling the sting". Held: The objection was waived; could not be raised on appeal. Had the motion in limine been denied on the merits, opposite result.

(2) On the next issue (prior acts), plaintiffs objected during defence counsel's opening statement reference to plaintiff's "long history of fire loss claims". Overruled. This objection was held adequately to preserve the record, so Plaintiff's later "pulling the sting" during trial was not a waiver, and the objection *could* be raised on appeal.

d. In *Higgins v. Higgins*, 296 Ariz. Adv. Rep 36 (CA1, 5/27/99), the mother's first objection to the father's offer of the parties' children's hearsay was overruled with the judge's comment that children's hearsay is reliable because there is little "likelihood of them . . . planning a statement for this trial." CA holds that no further objection was necessary on the later child hearsay because it would have been "futile." (Father testified that *his* mother (grandma) told him that Michael (child) told her that Mother had slapped him once. Also that Michael had told him that Mother had spanked Jessica once; that the "children" told him that Mother's boyfriend threw a VCR into a wall once; and that two of the children told him that boyfriend drank a big beer every day.)

e. Although a motion in limine may timely raise an evidentiary issue, three motions are two too many. *State v. Hernandez*, 191 Ariz 553, 559 P.2d 810 (CA1), fn. 5: "We strongly disapprove of this wasteful and annoying practice."

1. Witnesses

a. Oath/affirmation - Ariz. Const. Art. 2 § 7: The mode of administering an oath, or affirmation, shall be such as shall be most consistent with and binding upon the conscience of the person to whom such oath, or affirmation, may be administered. See also, Ariz. Const. Art. 2 § 11; A.R.S. 12-2223

b. Competency; witness must have capacity to

(1) **perceive**

(2) **remember** that which was perceived and

(3) **report** the same.

c. Child witnesses: presumption against competence, in civil cases, if under ten years old, A.R.S. §12-2202(2). All persons competent in criminal cases, A.R.S. §13-4061. (Note, A.R.S. 13-1416, child hearsay in sexual offense trials, held unconstitutional. *State v. Robinson*, 153 Ariz. 191, 735 P.2d 801 (1987).)

d. Order of witnesses can be controlled by the court. *Evidence Rule 611*

2. Witness examination.

a. Control by the Court. *Evidence Rule 611(a)* provides

The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to

(1) make the interrogation and presentation effective for the ascertainment of the truth,

(2) avoid needless consumption of time, and

(3) protect witnesses from harassment or undue embarrassment.

b. Order of examination: direct, cross, redirect; sometimes recross, but beware the judge who will let it deteriorate into an effort to "get in the last word".[3] More below:

c. Direct examination:

(1) Scope: Proponent of witness elicits testimony which supports his/her case; or, if the purpose of calling the witness is to discredit the opponent's case, do that.

Too often, the direct examiner tries to anticipate all the cross-examination that might arise, resulting in a muddled direct. Typically, too, the trier of fact doesn't understand the significance of such "anticipatory" information, and so the information is forgot. The trial judge is within his/her rights to insist the direct examiner stay within the original reason for calling the witness, leaving such "anticipatory" information for the redirect examination.

(2) Questioning style: should be "non-leading." Generally, "Please tell ..." or "what?" "where?" "why?" "when?" and "how?" are proper questioning forms. A question beginning with "Did ..." usually means the lawyer is about to supply the answer.

(3) Leading is OK on matters not truly contested and on which the credibility of the witness is not involved, such as

(a) Introductory material - witness's name, address, employment. There is no risk of a false answer here.

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[3] Note that the order of procedure - proponent, opponent, proponent - applies to the order of the parties' cases: plaintiff/State, defendant, plaintiff/State. The court does have discretion here, too, however. *State v. Talmadge*, 321 Ariz. Adv. Rep. 3 (CA2 5/5/00), was a prosecution for child abuse; defense was that the child had Temporary Brittle Bone Disease. The defense was logistically cornered into calling a weak expert witness; but the state had a strong one. At the last minute, the defense found a powerful expert, and noticed him as a "surrebuttal" witness. Conceding that surrebuttal is rare, the Supreme Court held the trial judge exceeded her discretion in precluding the "surrebuttal" witness. Justice Martone dissented, saying that "surrebuttal" is "no way to run a trial." See *Criminal Rule 19.1(a)*.

(b) "Guiding" questions, which direct the witness to the date of the litigated incident, and the like.

(c) Refreshing recollection; the witness's mind has just gone blank. Judicial discretion needed here, to insure against providing information which the witness *never* knew.

(d) Child witness. Here, there is a serious risk of suggesting information to a pliable witness, and close judicial scrutiny must be maintained.

(4) Leading, on direct examination, is also OK of a "hostile" witness, or any opposing party, or a witness "whose interests are identified with an adverse party". *Evidence Rule 611(c).*

(5) Narrative questions/answers

(a) Advantage is that a story can intelligibly be told.

(b) Frequently, these draw objection, because the objector cannot timely intercept hearsay, incompetent, irrelevant, or otherwise objectionable evidence. If it is a jury trial, this is a justifiable risk; in a judge trial, suit yourself.

d. Cross-examination.

(1) Scope: Under Arizona Rules, the cross-examiner may cover any subject relevant and material to the inquiry. *Evidence Rule 611(b).* (Compare Federal Rule, which requires that the cross be limited to the "scope of the direct.")

(2) Questioning style: Leading.

(a) A leading question is one which requires the witness concede the existence or non-existence of a fact. If the question truly can be answered "yes" *or* "no" it is not leading. It is leading if it can *only* be answered "yes" or *only* "no."

(b) *Examples*:

- Did you go there afterwards? Answer yes or no.
- You went there afterwards, didn't you?

(3) Many lawyers don't know this, and actually ask questions which call for substantive information from the witness. Then they get mad because the witness seems to be out of control. The problem is the lawyers': while the lawyer may try a "non-responsive" objection, chances are the information is relevant and material, and the judge will allow it in evidence.

e. Redirect examination

(1) Scope *is limited* to the *scope of the cross-examination*. If it was a broad-ranging cross, the redirect may be as broad. But if the cross, say, touched only on the witness's bias ("You're a good friend of the [party], aren't you?"), the redirect may only seek to explain, deny, or mitigate the impact of the bias itself.

(2) If the examiner wants to go into matters not covered on cross, he/she should request permission to "reopen direct". That in turn allows for new cross-examination on the new matters.

(3) It is improper redirect examination to elicit information already brought out during direct examination. This is not a time to repeat. Redirect is only to "rehabilitate", to repair damage done during cross, to explain, but *not* just to "get in the last word" when the word already was got in during direct.

(4) Question style: *non*-leading (subject to same exceptions as with direct). Remember, this is the direct examiner. But, because the examiner must now repeatedly direct the witness's attention to a part of the cross, there may be considerable "guidance". The judge should insist, nevertheless, that the *source* of substantive information be the witness, not the lawyer.

3. Impeachment: attack on credibility or believability of evidence. *EvRule 601 et seq.*

a. Methods:

(1) Prior inconsistent statement (see below)

(2) Motive to lie: friend, enemy, interest in the outcome

(3) Bias

(4) Prior convictions of crime *EvRule 609*

(5) Prior bad acts (see below)

(6) Incompetency as a witness: unable to observe, or to remember, or to relate

(7) Lack of personal knowledge

(8) Character for truthfulness or untruthfulness: proved by opinion on veracity or reputation in the community for veracity. *EvRule 608(a)* (See below).

(9) Specific error - witness is demonstrably wrong on some objective fact

(10) The incidental effect of contradictory testimony from other witnesses

b. These methods may be used against both live and hearsay testimony. EvRule 806; *State v. Hernandez*, 191 Ariz 553, 559 P.2d 810 (CA1).

c. Lawyers sometimes think impeachment is retrial of their case - put every closing argument point to the witness; opposing counsel (and, one hopes, the judge) must know better.

d. **Character for "truthfulness or untruthfulness"** may be proved by having a witness testify:

(1) I know W-1 has a reputation for being an honest and truthful person.

(2) I know W-1 has a reputation for being a liar.

(3) I believe W-1 to be honest.

(4) I believe W-1 to be a liar.

(5) The reason for the restriction to "character for truthfulness or untruthfulness" is to avoid a trial on all the witness's good or bad acts over the span of life. The *reputation* is the community's assessment (hearsay piled upon hearsay), thus a general compendium based on all those good or bad acts about which the community knows or hears. The *opinion* is now allowed because most character witnesses gave it even when it wasn't allowed. Note, (below, "prior bad acts") that cross-examination of these "character" witnesses may explore specific good or bad acts about which the witness may have "heard" (re: *reputation*) or may "know" (re: *opinion*). The questioner must have a good-faith basis for asking about these acts, but cannot prove that basis if the witness denies hearing or knowing about them. Again, we avoid a trial on all the acts of a life-time.

e. **Prior bad acts:** Evidence of a person's prior bad acts may be proved to impeach that person:[4]

(1) As the incidental effect of proving a person's prior conviction of a crime to impeach testimony of that person. *EvRule 609.*

(2) To attack a witness's credibility, but

(a) The bad acts must be probative of the witness's "truthfulness or untruthfulness", and

(b) The attack must come only during cross-examination of that witness;

i if the witness denies the prior bad act, the cross-examiner is stuck with the denial, and cannot bring in other witnesses to prove the bad act. (Otherwise, we'd have a trial on the bad acts.) *EvRule 608(b)*

ii The questioner must have a good-faith basis for asking the question, even though that basis is not itself provable (except to the court, in a 104 hearing on admissibility).

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[4] Compare *EvRule 404(b)*, allowing proof of prior acts as part of the larger picture, i.e., to show motive, knowledge, complete the story, etc. It is these acts that must be proved by clear and convincing evidence. *State v. Terrazas*, 189 Ariz. 580, 944 P.2d 1194 (1997).

iii The trial court has discretion to exclude prior bad acts testimony even if it is probative of credibility, even if is only about an arrest without a conviction, and even if it is known that the witness, on cross-exam, will admit it. *State v. Woods*, 141 Ariz. 446, 450, 687 P.2d 1201 (1984).

(c) *Example:* Q: Isn't it true, Ms. Witness, that you embezzled funds from your former employer? A: No.

(d) *Example:* Q: Isn't it true, Mr. Witness, that you were arrested for embezzlement of funds from your former employer? Objection, irrelevant! Ruling?

(3) Prior bad acts may also be proved during cross-examination of a witness who has testified to the "character for truthfulness or untruthfulness" of another witness. Thus:

(a) W-1 Testifies

(b) W-2 is called, testifies that W-1 has (1) a good reputation for truth and veracity and (2) W-2 is of the opinion that W-1 has a good character for truth and veracity.

(c) The cross-examiner of W-2 may ask:

i As to reputation, "Have you *heard* that W-1 embezzled from her employer?"

ii As to opinion, "Do you *know* that W-1 embezzled from her employer?

(d) Prior bad "things" may be examined in this context, as, to test the witness's true knowledge of W-1's "good character" reputation, W-2 may be asked, "Have you heard that W-1 was arrested for embezzlement?" Even though an arrest is not itself a bad act, *EvRule 608*, or conviction of a crime, *EvRule 609*, news of the arrest would likely be included in a "reputation."

(4) Note, prior "bad" acts may be proved as part of the proof of a person's "bad" *habit*, where the person has testified to his habit and has asserted that it is "good". This is an application of the "habit" rule (EvRule 406), not the general relevance rules relating to character (EvRule 404)

In *Gasiorowski v. Hose*, 182 Ariz. 376, 897 P.2d 678 (CA 1, 1994, Review Denied 1995), Dr. Hose was sued for allegedly improperly inserting a catheter as part of an epidural anesthetic administration. The doctor said he didn't remember the specific procedure, but testified to his "habit" of administration, and, as an expert witness, opined that his habitual method met reasonable medical standards. It was held error for the trial judge to disallow proof that Dr. Hose's epidural privileges had been suspended many months later for three separate incidents in which he had had "difficulty threading the epidural catheter." The decision, written by Judge

Noel Fidel, apparently holds that three separate incidents make "habit", that the nurses who witnessed the incidents could testify about them, despite the trial judge's concern about a "mini-trial" on each, that the incident reports were admissible despite the hearsay problem, and that the hospital's letters of suspension were admissible, despite the obvious problems of hearsay and opinion-without-foundation. Apparently, when Dr. Hose said his "habit" met medical standards, he became fair game to show the hospital's disagreement on absolutely unrelated incidents wherein one must infer he used his "habitual" method with poor, though different, results.

f. Impeachment by prior inconsistent statements. *Evidence Rule 801; Criminal Rule 19.3.*[5]

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[5] **Criminal Rule 19.3 Evidence** [at trial]

a. General Rule. The law of evidence relating to civil actions shall apply to criminal proceedings, except as otherwise provided.

b. Prior Inconsistent Statements. No prior statement of a witness may be admitted for the purpose of impeachment unless it varies materially from the witness' [sic.] testimony at trial.

c. Prior Recorded Testimony.

(1) *Admissibility.* Statements made under oath by a party or witness during a previous judicial proceeding or a deposition under Rule 15.3 shall be admissible in evidence if:

(i) The party against whom the former testimony is offered was a party to the action or proceeding during which a statement was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which the party now has (no person who was unrepresented by counsel at the proceeding during which a statement was made shall be deemed to have had the right and opportunity to cross-examine the declarant, unless such representation was waived) and

(ii) The declarant is unavailable as a witness, or is present and subject to cross-examination.

(2) *Limitations and Objections.* The admissibility of former testimony under this section is subject to the same limitations and objections as though the declarant were testifying at the hearing, except that the former testimony offered under this section is not subject to:

(i) Objections to the form of the question which were not made at the time the prior testimony was given.

(ii) Objections based on competency or privilege which did not exist at the time the former testimony was given.

(1) Witness has told story "T" at trial. At some earlier time, the witness has told story "P", which is significantly (to this trial) different. Story "P" may be proved to show the witness is not now telling the truth. Further, story "P" may itself be believed by the trier of fact.

(2) Story "P" is proved by getting the witness to admit he/she said it, or by calling another person to testify that the person heard the witness tell story "P".

(3) Prior *consistent* statement: This can be used only to rehabilitate a witness, and only when logically it does so.

(a) *Example*: **To refute a claim of "recent fabrication":** Witness has told story "T" on direct examination. Cross-examiner gets witness to admit telling story "P" earlier, suggesting witness has "recently fabricated" his trial testimony ("T"). On redirect, it is proved that witness told story "T" right after the incident to an investigating officer. The logical inference is that story "P" was a mistake, and "T" is true.

(b) *Hypothetical*: Drive-by shooting from a car; in subsequent chase, car is wrecked and four people flee from it. Three are caught, each telling police that D (the fourth car occupant) was the shooter. At trial, each of the three testifies that D was the shooter. D offers alibi testimony.

i Does this infer that the trial testimony by the three accomplices is a "recent fabrication" - that they got together before trial and agreed to pin this on D?

ii May the state, in anticipation of this inference, offer the prior consistent statements they made to arresting police?

iii Does it make a difference whether the state offers the prior consistent statements in its direct case or its rebuttal case?

(c) *Example*: **To refute a claim of bias:** Cross examiner gets witness to admit being a good friend of a party. Redirect examiner proves story "T" was told by the witness before he/she knew the party, or knew the party was involved in the case.

(d) *Example*: D arrested for DWI; during field sobriety tests, D tells officer he had nothing to drink. He tells the same story at court, and wants to use his prior consistent statement. Inadmissible: there has been no claim that his trial testimony is "recent fabrication" or "bias" of the type which would be refuted by showing the prior story.

(e) Another situation: Defendant testifies at trial that he had nothing to drink. Previously, he told the officer he did. But the officer had not given D his Miranda rights. After D testifies, can the state prove the "anti-Miranda" statement to impeach? Yes. *Harris v. N.Y.*, 401 U.S. 222

(4) Whenever a prior statement is offered, foundation must be shown: **time, place, persons present**. Also, the conversation should be "reported" not "characterized" if possible.

(5) Prior Inconsistent Statement in the form of State's witness's entire video-taped Preliminary Hearing testimony admitted at trial because "totally inconsistent" with trial testimony. Video presentation was proper because more accurate than non-video presentation; under *State v. Skinner*, 110 Ariz. 135, 515 P.2d 88 (1973), EvRule 801, and Crim R. 19.3, jury can consider credibility of prior statement. *State v. Mills*, 293 Ariz. Adv. 7 (CA2, 2/25/99).[6]

(6) Prior inconsistent statements themselves may support a conviction. *State v. Miller*, 187 Ariz 254, 928 P.2d 678 (CA 1, 1996). The trial judge should consider whether:

(a) the witness being impeached denies making the impeaching statement, and

(b) the witness presenting the impeaching statement has an interest in the proceeding and there is no other corroboration that the statement was made, or

(c) there are other factors affecting the reliability of the impeaching witness, such as age or mental capacity,

(d) the true purpose of the offer is substantive use of the statement rather than impeachment of the witness;

(e) the impeachment testimony is the only evidence of guilt.

g. Does inadmissible evidence become admissible in rebuttal or to impeach?

Yes. See *St. v. Menard*, 135 Ariz. 385: Hammer, suppressed for bad search,

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[6] Defendant hired Estrella to murder his estranged wife; Estrella lost a kilo of cocaine Dft had given him to sell, and Dft claimed Estrella owed him $10,000 for it. Meanwhile, Dft had recovered $850,000 settlement from a car accident, and was upset because his wife wanted to take it from him. So Estrella shot the wife, after which Dft gave Estrella $4,500 cash. A year later, the cops were turned on to Estrella, who confessed and inculpated Dft. Estrella so testified at preliminary hearing. Problem was, at trial, he said he had gone to wife's house with "Manuel" who went into the house while he waited outside in the car; he knew nothing of the murder until he saw it on the news that night. "Totally inconsistent."

would be admissible later to impeach D's assertion he had no connection with the crime. *Harris v. N.Y.*, 401 U.S. 222: Anti-Miranda statement later admissible to impeach defendant.

(1) *Example:* Defendant says "2 beers"; BAC test, inadmissible in state's direct case, offered to show 5 beers.

It would seem a distinction should be made between (1) credible evidence inadmissible for some policy purpose, and (2) evidence inadmissible because *not credible* or *competent*. If the evidence is credible, then the reason for its inadmissibility may fall when trial circumstances make it relevant to D's credibility. So hammer, which is credible, becomes admissible. But in BAC test case, if the BAC test is *scientifically unreliable* and therefore incompetent to show that D had five beers, it should still be unreliable and incompetent on that point to impeach D's assertion that he had only two beers.

(2) If defendant testified that he was never offered a BAC test, the state should be allowed to impeach by showing that he did in fact have one. Whether the five-beer reading would also be inadmissible is yet another question.

h. Compare prior reported testimony, not necessarily inconsistent; Crim R. 19.3. See *State v. Luzanilla*, 179 Ariz. 390, 880 P.2d 611 (1994): Prior trial's reported testimony of witness cross-examined by co-defendant's lawyer held inadmissible; witness refused to testify in Luzanilla's trial but admitted the prior testimony was his. *Inter alia*, the co-defendant's motive to cross-examine was different from defendant's, since the witness at the earlier trial was putting blame on Luzanilla, not co-defendant.

4. Refreshing recollection; past recollection recorded or present recollection refreshed?

a. Theory: A witness must testify from present recollection. (Perceive ... recall ... relate) Sometimes a witness needs help recalling. Any device may be used to do it, including a leading question or a tune from World War I.

The device does not come in evidence (though opposing counsel surely will want to see it and is entitled to do so). *EvRule 612*

b. If the witness did observe, and can relate, but cannot recall, a "past recollection recorded" may come in evidence. That is, the witness, when he/she *did* recall, wrote down the recollections. Now, at trial, the witness can only say the writing was accurate when done. That makes the writing admissible *instead* of live testimony. *EvRule 803(5).*

c. Note: the report comes in "like" hearsay; the reporter (the witness) is available for cross-examination, but the premise is that the witness has no present recollection, so cross-examination won't be very interesting.

A police report like this is generally *not* admissible hearsay under *Evidence Rule 803(6)*, however, because the report was *prepared in contemplation of litigation* and therefore is not accorded a presumption of reliability. (Compare discussion of 803(8) below.)

d. Problem is usually the hybrid situation, as where a police officer routinely makes a report and wants just to read it to the judge or jury. Uh-uh. Either tell us what you remember, or that part of the report covering the matter comes in evidence. Typical solution, though, is to let the witness refer continuously to the report and assure us that the testimony is based on present recollection.

e. Ars 8-537...B. The court or jury's findings with respect to termination shall be based upon clear and convincing evidence. **The court or jury may consider any and all reports required by this article or ordered by the court pursuant to this article and such reports are admissible in evidence without objection.**

5. Privileges *EvRule 501*

a. A "privilege" allows a person or party to prevent release of information:

(1) witness may refuse to testify

(2) party may prevent testimony by another witness

(3) trade secrets

b. Generally, the information itself is relevant and material; the reason it is closeted is based on some policy:

(1) protection of the marriage relationship. *Anti-marital fact* privilege, A.R.S. §12-2231, and *marital communication privilege*, A.R.S. §12-2232; A.R.S. §13-4062.

(a) "Anti-marital fact privilege" allows one spouse to prevent testimony against him/her by the other spouse. Coterminous with the marriage.

(b) Marital communication privilege blocks testimony of *confidential communications* between spouses. This privilege extends beyond the life of the marriage.

(c) Under new law, later marriage does not block testimony of a crime. Can't marry the witness and get silence. A.R.S. §§13-4062, 4063

(d) Privilege is inapplicable

i where one spouse has committed a crime against the other

ii cases of child neglect, dependency, abuse or abandonment (even child other than that of the defendant)

(e) "Either spouse may, at his or her request, but not otherwise, be examined as a witness for or against the other in a prosecution for bigamy or adultery, committed by either spouse, or for rape,

seduction, the crime against nature or any similar offense, committed by the husband." A.R.S. §13-4062.

(2) protection of some confidential fiduciary relationship such as *priest-penitent, lawyer-client, doctor-patient* (A.R.S. §§12-2233, 34, 35; A.R.S. §13-4062(2,3,4))

(a) See also *reporter-informant* privilege (A.R.S. §12-2237)

(b) *Accountant-Client* privilege, A.R.S. §32-749

(c) *Statements* (but not "threatened or actual violence") *made during mediation* (A.R.S. §12-2238; note, the mediator is not subject to process or subpoena at all.)

(3) Note: **There is no "mother-son" privilege.**

c. The privilege is waived by the client or patient "voluntarily testifying" about communications with the lawyer or doctor. A.R.S. §12-2236. In a recent and troubling opinion, the Arizona Supreme Court held that an insurance company being sued for "bad faith" waives its attorney-client privilege when it defends alleging it acted in good faith on the facts and the law as it understood them to be at the time. *State Farm Mutual Automobile Ins. Co. v. Lee*, CV 99-9407 PR (12/7/00). (Class action claiming bad faith refusal to allow "stacking" of uninsured and underinsured coverages of multiple policies; statute requires particular policy language to avoid it. Question whether the policy language complied with statute; company did *not* claim it acted on advice of counsel, but Justice Feldman basically took judicial notice of the company's reliance on counsel to support its claim that it had made a reasonable evaluation of the law, the statute, and its policy language.)

d. **Fifth Amendment Privilege against self-incrimination.**

(1) Privilege is to decline to testify to any information that will tend to show (i.e., provide some link in the chain of evidence) the witness has committed a crime.

(2) *Example*: Parent in termination proceedings; testimony about "abuse", "drug use" etc.

(3) A witness must exercise this privilege question-by-question.

(4) Criminal defendant must exercise the privilege by refusing entirely to take the witness stand. Testimony is waiver; there is only one issue (guilty or not), and even stating his/her name is relevant to the issue. Note that defendant does not make a general waiver of this privilege by testifying in a suppression hearing. See *EvRule 104(c,d).*

6. Opinions. *Evidence Rules 701-06*

a. Non-expert (lay witness): Can't express opinions. Just the facts, ma'am. Well, if the opinion is *really* just a shorthand version of the facts, then OK: Such as: "She

was drunk," or "The car was going fast," or "He was acting crazy." *EvRule 701*

b. Expert: Wigmore and EvRule 702: A person of knowledge, education, training or experience beyond that of the average lay person may opine in that area of knowledge, education, training or experience.

(1) In area of expertise, of course.

(2) Expertise:

(a) **Training, experience, education** in a given area beyond that the normal lay person will have;

(b) *and* this expertise will assist the trier in deciding an issue.

(3) *Examples*:

(a) **Criminalist** says everyone is impaired at .08; not common knowledge, requires expert testimony.

(b) But **psychiatrist**'s testimony was held inadmissible on effect of alcohol on defendant's ability to form a specific criminal intent, and the effects of alcohol and drugs on defendant's mental capacity to understand the meaning of any statements he made to the police (on the voluntariness issue). *State v. Laffoon*, 125 Ariz. 285, 486-7, 610 P.2d 1045 (1980)

(c) **An economist is not an expert in researching actual employment practices.** *Ehman v. Rathbun*, 116 Ariz. 460, 569 P.2d 1358 (C.A. Div. 2, 1977) (pre-evidence rules case). Court rejected an economist's reliance on an informal survey he made of hiring practices of mines in the Tucson Area. The expert had testified that his survey of local mines showed that to become a truck driver, the plaintiff would first have to do hard labor, then apply for a truck driver; therefore he could not directly get a job as a truck driver, which was high paid. Since he couldn't do hard labor because of his injuries, his employment chances were thus limited. The court reversed because of the "informal survey" foundation for this testimony on the issue of damages.

(d) Children's propensities

i Expert on shaken-child syndrome manifested by Indian child victim need not be an expert on Indian affairs, Indian culture, Indian reservation life, or Indian children. *Rachelle S and Mark B v. Ariz. D.E.S.*, 269 Ariz. Adv. Rep. 3 (CA1 5/14/98)

ii Expert testimony on characteristics of child-abuse victims is admissible to show victim in this case might have misinterpreted D's touch because of prior abuse of

the victim by other persons. *State v. Lujan*, 281 Ariz. Adv. Rep. 6 (SC, 10/22/98). In *State v. Moran*, 151 Ariz. 378 (1986), ct held admissible expert testimony on such behavioral characteristics to help the jury evaluate the child's recantation after the child learned her testimony would put her father in prison. [Same sword, other edge.]

(e) May an expert testify to "**ultimate issue**" in criminal case? *Fuenning v. Superior Court*, 139 Ariz. 590, 680 P.2d 121 (1983).The Supreme Court said "yes" in words that sound like "no."[7]

This Supreme Court *dictum* is usually over-applied; it probably is intended only to preclude a police officer, who may be an expert in impaired driving, from saying, "I am of the opinion defendant is guilty of driving while impaired by alcohol." Certainly the officer may opine to the component parts: that the defendant was impaired by alcohol, and that he was driving, and that his driving was impaired.

A recent case shows the havoc wreaked by the Supreme Court: In *State v. Miller*, 288 Ariz. Adv. Rep. 48 (1CA 2/9/99) (reversed on other grounds), the arresting officer, over objection, was permitted to answer "Yes" to Q: "Are these signs and symptoms consistent with someone impaired by alcohol to the slightest degree?"[8]

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[7] In our view, ordinarily it would be neither necessary nor advisable to ask for a witness' [sic] opinion of whether the defendant committed the crime with which he was charged. When, in a DWI prosecution, the officer is asked whether the defendant was driving while intoxicated, the witness is actually being asked his opinion of whether the defendant was guilty. In our view, such questions are not with the spirit of the rules .... It ordinarily would be proper to ask the witness in such a case whether he or she was familiar with the symptoms of intoxication and whether the defendant displayed such symptoms. The witness might be allowed to testify that defendant's conduct seemed influenced by alcohol. However, testimony which parrots the words of the statute moves from the realm of permissible opinion which "embraces *an*" issue of ultimate fact ... to an opinion of guilt or innocence, which embraces all issues. This makes it easy for the jury to acquit or convict based on their empathy for the witness, rather than their consideration of the evidence. We see little to be gained and much risk from such methods. 139 Ariz. at 136, emphasis in original.

[8] The "signs and symptoms": Bloodshot watery eyes, odor of alcohol, he's admitted drinking, you've observed his balance and have listened to his speech."

Also over objection, AO testified that he had, in his 16-year career, conducted "well over

Miller stated these Rules:

(a) Opinion testimony on an ultimate issue of fact is admissible. EvRule 704

(b) *Fuenning* recommends that trial courts exercise caution in admitting such evidence with respect to the intoxication of defendant; but such evidence is NOT INADMISSIBLE.

Court quoted the *Fuenning* footnote, which specifically refers to an opinion "whether defendant *was driving while intoxicated*" which simply parrots the statute. But cases have held that an officer may opine that Dft was driving; and that he was intoxicated. But *State v. Lummus* held inadmissible rating D's intoxication as "ten plus" on a scale of one to ten was equivalent of stating that D was extremely intoxicated and improper. 190 Ariz 569 (CA 1997). Also "under the influence" held impermissible because parroted the words of the DUI statute. *State v. White*, 155 Ariz. 452 (CA 1987). Here, the court drew the line between opinion that D was actually impaired, and statement that the signs and symptoms were "*consistent with* someone who was impaired by alcohol to the slightest degree."

Judge Noel Fidel, dissenting, illustrates this pin-head dance of the angels, by arguing that it would be OK for the cop to testify that "D's behavior was consistent with that of a person impaired by . . alcohol. But the state gratuitously and improperly 'parrot[ed] the words of the statute' by using the words 'impairment to the slightest degree'" and crossed the *Fuenning* line.

ii. *Example of Specialized Training*: You and I may not be able to tell one fingerprint from another, but the person from the crime lab has had special training in counting ridges and grooves, and can help us decide whether two prints came from the same finger.

iii. *Example of Experience*: Truck driver can explain why a semitrailer jackknifed going downhill.

iv. *Example of Formal Education*: Pathologist can explain the cause of death.

v. Expert's opinion need not itself conform to the *Frye* (scientific principles) test so long as any principles used by the expert do conform to that test - i.e., that they are generally accepted in the scientific community which uses them. *State v. Hummert*, 238 Ariz. Adv. Rep. 25 (S.Ct. 3/11/97); *State v. Boles*, *id.*, 37 (S.Ct. 3/13/97).

200" DUI investigations, had opportunity to come into contact with persons under the influence of alcohol; so impaired they cannot walk; with persons that are impaired to the slightest degree, including observing their signs and symptoms.

> Although compliance with *Frye* is necessary when the scientist reaches a conclusion by applying a scientific theory or process based on the work or discovery of others, under Rules 702 and 703 experts may testify concerning their own experimentation and observation and opinions based on their own work without first showing general acceptance. Such evidence need only meet the traditional requirements of relevance and avoid substantial prejudice, confusion, or waste of time. [Rule 403] *Hummert, supra, id.* at 30.

The court held admissible DNA testimony, based on generally accepted science that DNA testing may discriminate between individuals, but held that the likelihood of a match need not be proved only by a generally-scientifically-accepted statistical method; it may be proved by the expert's opinion that such matches have never occurred and are unlikely to occur in that expert's experience.

b. Statistical analysis of DNA probability match held admissible because expert testified the statistical formula was "generally accepted in the relevant scientific community. *State v. Garcia*, 305 Ariz. Adv. Rep. 7 (CA1 10/5/99). One victim, two rapists, mixed DNA; likelihood that one of two DNA samples belonged to defendant. Narrow holding.

> We hold that the statistical formulas used to determine the likelihood ratios corresponding to the DNA matches in this case satisfy the *Frye* standard for admissibility of scientific evidence.[9]

c. Spm Ct seems to have unhinged the *Frye* rule from expert witness testimony, however, in *Logerquist v. McVey (Danforth, RPI)*, 320 Ariz. Adv. Rep. 15 (4/19/00), in holding that an expert may testify to his own observations supporting a principle upon which there is no medical agreement. Here, the expert testified that people could suffer "repressed memory" from a traumatic event (alleged sexual abuse of plaintiff by defendant psychiatrist twenty years before the complaint was filed) and could recall that memory with accuracy. The majority

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[9] At p. 7. Here, two persons raped Victim; DNA "could not exclude" D as one of the two. Dr. Basten, a statistician, was called in to give the "likelihood ratio" of it being defendant. The court held the evidence was competent because the state's expert said the Dr. Weir formulas were "generally accepted in the scientific community" and the court's own research showed the National Research Council agreed.

The court recognized the narrowness of its holding, and in footnote 2 discussed the view of some commentators (Koehler) that likelihood ratios are too complex and confusing to be of assistance to jurors and should therefore be deemed inadmissible. The court thought "fundamental confusion over the results and the significance of Dr. Basten's statistical analysis" happened in this case as shown by questions posed to the witness by both lawyers and the judge. - !

conceded the "principle" was "woefully short of being empirically verified" but said the expert here was not testifying to a principle, just to a behavioral phenomenon he had observed - this, to explain plaintiff's delay in filing suit. The court characterized the testimony as only explaining behavior (such as a child's recantation of molest by a family member) and not rendering an opinion on the credibility of plaintiff's story. But how could the expert *know* the childhood event occurred? And how could he *know* that it was being "recalled"? And how could he *know* the recall was "accurate"?

While at it, the Spm Ct refused to adopt the *Daubert* rule instead of *Frye*, saying the *Frye* rule presents an objective question for the trial court - whether the scientific principle has "general acceptance in the relevant scientific community" - whereas *Daubert* invites the trial court to evaluate the principle subjectively. This, the court felt, was akin to the court "commenting on the evidence" by taking the evidence from the jury entirely.

d. *Example*: Indecent Exposure or Public Sexual Indecency per A.R.S. 13-1402,3: A "reasonable person would be offended or alarmed" by the defendant's act. Can a vice officer, looking in a "25-cent movie" booth, be offended? Is he/she an expert on what is offensive or alarming?

(Probable solution: Officer is *not* an expert; he/she testifies only to what happened and the trier does the evaluation of "offensiveness".)

2. Marking exhibits: "For Identification" or "In Evidence"

a. "*For Identification*" means we have put a court label on the item while we debate whether to let it be considered as evidence. When we label it, it becomes the possession of the court, and part of the record, but no more.

b. "*In Evidence*" means the item may be considered by the trier of fact: it may be smelled, fondled, looked at, whatever. It is in the possession of the court, and it is part of the record, *and* it is part of the body of information to be considered by the trier of fact.

c. Marking exhibits is not a formalized process. Judge or clerk marks them. They can be marked in advance during housekeeping session. Make sure to keep distinction between evidence merely marked "For Identification" and that marked "In Evidence."

d. Litany on exhibit offer: The lawyer should say something like, "I offer 'Exhibit 5 for identification' in evidence."

If the court decides to admit the exhibit, the judge should say something like: "'Exhibit 5 for identification' is admitted in evidence." Sometimes lawyers say, "I move the admission of Exhibit 5, etc." If admitted, the judge technically should say, "Motion is granted. Exhibit 5 for identification is admitted in evidence."

e. Remember, once an exhibit is *admitted*, make sure it gets marked "*in*."

f. *And, counsel, once the exhibit is "in evidence" SHOW IT TO THE JURY! Have the witness step with you to the jury and explain it ("with the court's permission").*

3. Objections and Motions *EvRule 103*

a. Unless a party objects, the evidence comes in.

b. An objection, to raise a legal issue, must state the legal ground, such as "hearsay" or "irrelevant". If it doesn't, the court can, basically, make either ruling safely.

c. If you as counsel wish to argue the objection (for or against) ask for permission to do so. "May we approach?" "May I be heard?" may work, but if you argue at benchside you may lose your court reporter. I recommend excusing the jury and arguing in open court if the objection is vital.

d. Motions may raise evidence issues, like a motion to suppress evidence, or to prohibit a person from using it. Make sure you get a ruling from the court: "Granted." or "Denied."

e. Make objections for only two reasons: (1) to block inadmissible information, or (2) to raise a legal issue. *Never*: to harass or annoy or because you don't like what the information will do to your case.

C. Common Quality-control Rules: Foundation, Relevance, Hearsay

1. Foundation

a. Like a house foundation, which supports the house and ties it to the ground; this is information which supports other information and ties it to the case; it is the story behind the particular bit of evidence a party wants considered by the trier of fact.

b. Foundation for <u>testimony</u>:

i. Identity of witness, and

ii. the witness was in a position to perceive (see, hear, smell, etc.) information of relevance to this case, and

iii. the witness is competent: able to observe, remember and report (usually presumed with adults, but not presumed with small children in civil cases)

iv. Note: foundation for *expert witness testimony*:

(1) Above three items, plus:

(2) The witness has expertise: Training, experience, education in a given area beyond that the normal lay person will have. (See discussion of "opinions" above.)

(3) Recall *Estate of Reinen v. Northern AZ Orthopedics, Ltd.*, 314 Ariz. Adv. Rep. 9 (Spm Ct 1/5/00), *supra*, that objection to lack of this foundation must be made before the testimony is taken.

v. *Example*: **State wants to offer caseworker's testimony that the child was abused. Can the caseworker testify to it just because he/she is a caseworker? What is the full foundation?**

c. Foundation for a *photograph*:

i. It fairly and accurately depicts something relevant.

ii. A witness who saw the something relevant must look at the photograph and say it "fairly and accurately depicts" what the witness saw.

iii. No need to bring the photographer to court, though it is frequently done.

iv. Note issues with CCD (digital) photographs, X-rays, spy cameras.

d. Foundation for a *conversation*: The witness who is asked to report the conversation must state:

i. time,

ii. place, and

iii. persons present at the conversation.

e. Foundation for a *diagram* or *map*:

i. A witness asked to show something must state that the diagram will assist in showing it; perhaps, too, that the diagram is an accurate scale diagram if this is an issue.

ii. The diagram may or may not become a formal "exhibit" to go into the jury room; but it may be considered in evaluating the evidence, and is commonly at least "marked for identification."

f. Foundation for a *business record*: The record is allowed to be considered if it is the type of record the business habitually keeps for its regular business purposes; thus it gains presumptive reliability. See *Evidence Rule 803(6)*. Just follow the text of the rule each time a business record is offered.

g. Foundation for a *public record*: See *Evidence Rules 803(8)* and *901(7)*. (See discussion below under "hearsay".)

i. It must be the record of a public office or agency.

ii. It may be authenticated by proving "it is from the public office where items of this nature are kept." 901(7)

iii. It must describe the activities of that office or agency, or

iv. It must describe matters observed by that office or agency "pursuant to duty imposed by law as to which matters there was a duty to report."

v. *Excluded*, however, in *criminal cases* are matters observed by a police or law enforcement officer.

vi. The record may also contain factual findings resulting from a legally-authorized investigation, if the record is being used

(1) in a civil case, or

(2) *against the government* in a criminal case. (The Confrontation Clause)

h. Foundation for *scientific evidence*:

i. **It is generally accepted in the relevant scientific community.** (The *"Frye* test"; *United States v. Frye*, 293 F.1013 (CADC 1923); See *State v. Bible*, 175 Ariz. 549, 858 P.2d 1152 (1993))

ii. *Example*, fingerprints and intoxilizers once had to be proved to be scientifically valid; now their validity is presumed. The trace metal detection test has to be proved scientifically valid. The "lie detector" cannot, in Arizona, be proved scientifically valid since it is based predominantly on the subjective impressions of the tester and the unprovable belief that people will physically react to their own lies; and not on objective scientific principle such as that alcohol measured in the breath relates physiologically to alcohol present in the blood.

iii. Note: Though the *science* of fingerprints or blood/alcohol readings is presumed valid, a *witness* to such evidence must be proved to have expertise in that science.

Note: Though a police report may contain fingerprint or blood/alcohol data or opinions, expertise would have to be proved, and the report itself would have to be shown to be admissible as a public record.

iv. DNA science is working its way through the courts: First, the principle that DNA may be tested; second, that DNA is unique to each individual; third, that testing may show unique qualities; finally, that statistical evidence demonstrates (at the present technological testing level) the likelihood of a DNA match between the defendant and another individual. The first three principles achieved "general acceptance" in the scientific community; but the statistical principles have come to acceptance only recently. See *State v. Bible*, 175 Ariz. 549, 858 P.2d 1152 (1993; *State v. Johnson*, 186 Ariz. 329, 922 P.2d 9294 (1996); *State v. Hummert*, 238 Ariz. Adv. Rep. 25 (S.Ct. 3/11/97). Note Justice Martone's concurring opinion in *Hummert, id.* at 30.

v. Federal requirement changed by U.S. Supreme Court June, 1993: The "general acceptance" test was superseded by Federal Evidence Rule 702 (like AZ rule). *Daubert v. Merrell Dow*, 509 U.S. --, 125 L.Ed.2d 469 (1993). The trial judge must determine:

(1) First, is it relevant: will it "assist the trier of fact"?

(2) Second, is the underlying reasoning or methodology scientifically valid and properly applied to the facts at issue? Trial judge must consider

- whether the theory or technique in question can be (and has been) tested
- whether it has been subjected to peer review and publication
- its known or potential error rate, and existence and maintenance of standards controlling its operation
- whether it has attracted wide-spread acceptance within a relevant scientific community.

(3) Inquiry must be flexible, with focus solely on principles and methodology, not on the conclusions they generate.

(4) Throughout, the trial judge must also be mindful of other applicable Rules.

(5) The *Frye* "generally-accepted scientific principle" rule does not apply to expert opinion based thereon; it applies only to the principle upon which the opinion is based. *State v. Hummert*, 238 Ariz. Adv. Rep. 25 (S.Ct. 3/11/97); *State v. Boles*, *id.*, 37 (S.Ct. 3/13/97). (Expert may give professional opinion, not itself "generally accepted" as to likelihood of finding a DNA match other than defendant's, so long as the DNA testing itself followed generally-accepted scientific principle. If "likelihood of a match" is itself proved through statistics, the sampling and analysis formulae must be "accepted."

(6) And see *Logerquist v. McVey (Danforth, RPI)*, 320 Ariz. Adv. Rep. 15 (4/19/00), *supra*, disconnecting *Frye* from expert opinion expressed as mere "personal observation"; and rejecting *Daubert* as the Arizona rule. Justice Jones specially concurred with the *Daubert* rejection, Justices Martone and McGregor dissented on both major points, with Justice McGregor strongly urging adoption of *Daubert*.

i. Foundation for *documents*. See *Evidence Rules 901* through *903*. Here, we are dealing with *authenticity* or "genuineness". The foundation will be information or circumstances proving that the document *is* what *it purports to be*.

i. A signature on a letter must be proved to be genuine:

(1) the signer admits; or

(2) secretary says, "That's my boss's signature;" or

(3) handwriting expert compares genuine signature, says this is the same handwriting.

(4) The trier of fact can compare the questioned document with an authenticated exemplar.

ii. **A public document must be proved to have come from a particular agency: records custodian of that agency says this document came from its files.**

iii. **A certified public record is offered: the certification may be enough. "Self-authenticating."**

iv. A notarized document. Must be *acknowledged* by the signer to be self-authenticating. *Evidence Rule 902(8).*

v. *Example*: **State offers copy of a record showing a person of parent's name had parental rights terminated . . . for another child . . . for the same reason as is now urged as to the subject child. Even a judicially noticed record of the court must be tied to the parent at bar. How to do it? fingerprints? a certificate purporting to be signed by a child welfare official attached saying the copy of the record is accurate and genuine? Must there be live testimony of a person who knows the parent from the prior case?**

j. Foundation for a *telephone call*: Whose voice *was* it on the other end of the line?

i. Witness recognized the voice from personal past experience.

ii. Circumstances show identification: call was made to a particular store, the voice answering identified that store. Inference: it was that store answering the call.

iii. Content of the call: witness wrote for information, the voice on the other end called at a normal time to give the information. Inference: the caller really was the person to whom the witness wrote.

2. **Judicial Notice.** I put this here as an issue of "quality control" and of "foundation." Quality control to avoid wasting time with evidence proving an indisputable fact. Foundation to move the court to take JN.

a. Judicial Notice is the court's accepting a fact as indisputable. Washington and Central intersect in downtown Phoenix. **The court's own records.** The sky appears blue. Local sunset and sunrise times. Water at sea level boils at 212° F.

b. Judicial Notice may be taken of a fact on the court's own motion or on motion of a party.

c. Judicial Notice may be taken at any time - even on appeal. See, *Robertson v. Motor Cargo*, 309 Ariz. Adv. Rep. 7, 10 (CA1, 11/30/99), taking notice, on appeal, that "some of the products shipped to Ace Hardware had to originate in states outside Arizona"; ergo they moved in interstate commerce; ergo the defendant trucking company was subject to interstate (ICC) regulations.

d. Foundation: The fact is indisputable and relevant. Of course, it helps the court to see some proof, such as the Farmer's Almanac.

3. **Relevancy**

a. Defined: The fact offered will help you decide the facts disputed. See *Evidence Rules 401-411.*

i. The information, with the aid of logic and common experience, raises an inference about a fact the trier must decide.

ii. There is no limit here, except from logic and common experience.

iii. The fact offered may tend to show something did happen or did not happen. *Evidence Rule 401*

b. Conditional relevancy, *EvRule 104(b)*: You offer a fact, but the judge cannot see how the fact offered will help decide the disputed facts of the case; so whaddya do? Avow to "connect it up" with more evidence. On this avowal, the court can let the evidence in, while assuring the opponent that it will strike it (or in severe cases grant a mistrial) if the fact does not "connect up." Opposing counsel raises the issue with a motion to strike or for mistrial.

c. Note that in hearing questions of relevancy (as with other admissibility questions) the rules of evidence (except privilege) do not apply. *EvRule 104(a)*. Obviously, such hearing is out of the jury's presence.

d. Logically relevant evidence may be excluded because

i. It confuses the issues.

ii. It unfairly prejudices a party.

iii. It may mislead the jury.

iv. It just plain takes up too much time and "the game ain't worth the candle". *Evidence Rule 402*

e. Logically relevant evidence will be excluded in certain cases, because of policy reasons (*Evidence Rules 404, 405*):

i. **Bad character**: *Example*, he's a negligent driver generally, so he probably

ran this red light. We won't hear about his general driving habits because it takes too much time, confuses the issues, attacks a person on his whole lifetime, and may well just be unfair. *Example*, he has committed other crimes, so he probably did this one. "Unfair" prejudice is obvious: the jury will concentrate on his past, not this crime charged here.

ii. Even **bad character** evidence, or evidence of **prior bad acts** or **other crimes** may be admitted it if it has a special logical significance, such as showing

(1) **identity** (criminal's M.O. is like a signature)

(2) **motive** (e.g., he did this crime to conceal his prior crime)

(3) **common plan or scheme** (like land fraud)

(4) **intent or knowledge** (he must have known it was marijuana because he has possessed it on three prior occasions)

(5) and others listed in *Evidence Rule 404(b)*.

(6) **In Parental Rights termination cases, certain character evidence about the parents would seem to be relevant, both for demonstrating intent of past acts and predicting the future of life for the child with the parents. ARS 8-533(B)**

(a) However, the "character" as set forth in the statute is not just bad character generally but rather is a rather specific propensity: to abuse the child (8-533(B)(2), or abuse drugs (*id.*(3). On the other hand, general bad character concerning child care pervades 8-533(B)(8) - the failure to fix a condition causing the child's out-of-home placement; especially (8)(b), which requires a finding on the liklihood of the parent's becoming "capable of exercising proper and effective care...".

(b) Prior bad acts evidence is admissible:

(i) Felony convictions, provided the court find the felony was "of such nature as to prove the unfitness of that parent to have future custody and control of the child...". *id.*(4)

(ii) Parent's rights to another child were terminated "within the preceding two years" and the same cause is now operating against the subject child. *id.*(10)

(7) Arizona has a special rule allowing proof of **prior sexual offenses** if it will demonstrate a "specific emotional propensity" to do the

sexual offense now charged. *Evidence Rule 404(c)*.[10] The Rule

(a) applies in criminal and civil cases of "sexual misconduct";

(b) requires the court admit the other-act evidence only if "[t]he evidence is sufficient to permit the trier of fact to find that the defendant committed the other act"; [note: No requirement of "clear and convincing" evidence here!];

(c) the evidence must raise a character trait inference of "aberrant sexual propensity; requires a 403 balance of relevance v. unfair prejudice;

(d) requires the court *make findings* and *instruct jury on limited purpose of the evidence*.

(e) Expert testimony is *not* necessary to establish relevancy of "dissimilar or remote acts" so long as there is some reasonable basis "to conclude that the commission of the other act permits an inference that a defendant's aberrant sexual propensity is probative. *State v. Arner*, 307 Ariz. Adv. Rep. 4 (CA1, 10/28/99)

iii. *State v. Mills*, 293 Ariz. Adv. 7 (CA2, 2/25/99) established the following procedure for admission:

(1) Such evidence must be admissible for a proper purpose and must be logically or legally relevant.

(2) The trial court must determine that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.

(3) Evidence is "unfairly" prejudicial if it has "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." p. 11

(4) Trial court must, if requested, give a proper limiting instruction.

(5) Finally, the proponent must show by clear and convincing evidence that the other acts actually occurred and that the defendant committed them.

ii. Compare recent cases of *State v. Mills, supra*, and *Brown v. USF&G Co.*, 277 Ariz. Adv. Rep. 27 (CA1 9/10/98):

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[10] . . . [E]vidence of other crimes, wrongs or acts may be admitted . . . if relevant to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged. In such a case, evidence to rebut the proof of other crimes, wrongs, or acts, or an inference therefrom, may also be admitted. . . .

(1) In *Mills*, the court allowed evidence that Defendant had cut his wife's truck's brake lines as tending to show that Defendant murdered his wife.

(a) Evidence of prior acts against the *victim of the charge being tried* may be admitted if it is for a proper purpose, here, to show Dft's intent and motive to eliminate his wife as a source of difficulty in his dissolution proceeding; also to rebut Dft's defense that "he loved [wife] and wanted to get back together with her, he would not want any harm to come to her and therefore, he was not involved in her murder." p. 100

(b) Other acts against *other* victims may *not* be admitted, because all they show is bad character. (But note that bad character may be admissible in self-defense case to show violent disposition of victim or defendant's reasonable belief that victim was violent.)

(2) In *Brown*, the "other acts" evidence was not necessarily of *bad* acts, but rather similar acts. Also, evidence was *admitted for a limited purpose.* (Jury should be so instructed.)

Brown sued his fire insurance company for refusing to pay when his insured home burned. The company claimed arson, and offered evidence of what the company's lawyer in opening statement called Brown's "long history of fire loss claims". The court held the following evidence admissible for the narrow purpose of showing that Brown had misrepresented his fire loss history on his application for this insurance. Brown argued the evidence was offered to show bad character for filing fraudulent fire loss claims, but the court held this impact insufficient to upset the balance of unfair prejudice and logical relevancy.

The evidence: Brown filed a claim for a pick-up truck fire in Colorado in 1972. In Kansas, Brown filed claims for a house fire in June 1977, a haystack fire in December 1977, a tractor fire in March 1978, a pellet mill fire in July 1979, a field fire in July 1983, and a farm building fire in Sept. 1983. Brown filed a claim for a shed fire in Arizona in Oct. 1988.

iii. Other sexual acts of victim. "Rape Shield": Discussion in *State v. Lujan*, 281 Ariz. Adv. Rep. 6 (SC, 10/22/98), holding expert testimony admissible about prior victimizations of child (alleged) victim in this case and conviction of another person for sexual abuse of the child. Court discusses *State v. Pope*, *State v. Oliver*, *State v. Castro*.

Rape shield does not bar admission of prior sexual conduct of the child victim here; indeed, showing that the child was previously victimized would not be unfairly prejudicial to the child, because the jurors would more likely be sympathetic from "hearing that [nine-year-old victim] had been terribly abused by another." But suppressing the expert evidence,

including the prior assaults on the child, caused "extreme prejudice to [Dft]."

The following are all "purposes other than to impugn or cast doubt on a victim's moral character":

(1) *Adult victim:*

(a) Acts with accused may show consent;

(b) prosecution opens door by asserting victim's chaste nature;

(c) to show victim's motive to bring accusations

(2) *Child victim:*

(a) that a child has been a victim of prior sexual abuse and thus was knowledgeable enough to fabricate the allegations here;

(b) to show alternate basis for child's explicit sexual knowledge;

(c) to give the victim the ability to imagine or contrive the later accusation.

iv. *Example*: Police: "We were called to the defendant's house on a complaint he was beating his wife, and we found cocaine." The most common prosecutorial importuning is to offer the other crime evidence "to complete the story of the crime."

v. *Example*: Domestic violence case. Complaining witness wants to testify to prior beatings by defendant; defendant may want to show prior "consents" by the complaining witness: "She liked to be beaten." The evidence is probably *not* relevant to issue of guilt, but may be relevant at sentencing. Best to lay ground rules of admissibility in advance of such a volatile dispute to avoid in-court explosions.

vi. *Example*: Police: "He said he didn't know it was marijuana, but we had arrested him three times before for possession of marijuana." Suppose, in a POM case, the testimony is that the prior arrests were for possession of cocaine.

vii. Beware of "habit" evidence, wherein "habit" may be proved by evidence of other acts (either before or after the litigated act). *Gasiorowski v. Hose, supra; EvRule 406.*

viii. **Subsequent remedial acts**: The landlord built a new stairway after plaintiff fell on the old one. We want to encourage improvement, so will not allow proof of the improvement. But if the landlord claims he had no authority over the stairway, we'll allow proof of his improvement because

it shows he *did* have authority.

ix. **Offers of compromise or settlement** will not be admitted to show "guilt" or "fault" because we want to encourage compromise and settlement, and because parties do settle simply to avoid litigation. (See "Mediation" privilege, A.R.S. §12-2238)

x. **Plea negotiations** in criminal cases not admissible.

2. **Hearsay.** *Evidence Rules 801-806.*

a. General situation: someone wants to prove that words were spoken or written out of court. Objection: hearsay.

b. There are three categories into which the words may fit:

i. Inadmissible hearsay

ii. Admissible hearsay

iii. Words which are not hearsay at all, but which are important because of the fact they were spoken.

c. Make sure you know what category the offer falls in. Have your evidence rule ready to recite in the event of objection; and, if you object, have your evidence rules at hand.

d. *Definition.* Hearsay is gossip: "I *hear* it *said*" something is true. Offered to prove: that the something *is* true. Trouble is, whoever *said* it is not on the witness stand where we can swear him/her in and watch him/her testify and make our own assessment of truthfulness. Hearsay is *testimony*; it's just "second-hand".

e. So we keep it out, **as a rule:**

"Hearsay is Inadmissible."

f. But we let it in, if it seems reliable:

i. The business record rule: some clerk said the customer bought an item and paid $X for it; and the clerk, per his job description, made out a sales slip which went into a regular accounting which now shows up in court. We don't have to hear directly from the clerk (who probably wouldn't remember anyway). We can read the business record, because it is probably reliable by virtue of being part of the business routine. *EvRule 803(6)*

ii. Doctor, on the witness stand, says the patient *said*, "I hurt here in my chest." Since the patient would probably tell the doctor the truth about such a thing, we'll let the hearsay in. We are entitled to believe it, and to conclude that the patient *did* hurt in the chest. *EvRule 803(3)*

iii. Doctor writes in hospital record that the patient *said*, "I hurt here in my chest." This is a combination of two hearsay exceptions, business record and statement of present physical condition. *EvRules 803(3,6)*. The patient probably wouldn't say it to the doctor if it weren't true, and the doctor probably wouldn't put it in the hospital record if it weren't true that the patient said it.

iv. Public Records and Reports, Evidence Rule 803(8)

(1) Records, reports, statements, or data compilations, in any form, of public offices or agencies setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, hhowever, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions . . . factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(2) Example: Witness to accident says, *at the time of the accident*: "My God! The Chevrolet ran the red light!" May be admissible as an excited utterance. *Evidence Rule 803(2)*. (And see Evidence Rule 805: "Hearsay included with hearsay" is admissible if each layer of internal hearsay satisfies an exception.)

(3) But what if the witness *later* says it to an investigating police officer? Can the officer testify that the person said to the officer, "The Chevrolet ran the red light." -?

(4) If not, would the result in a written police report be the same? The second outburst would be excluded because lacking "trustworthiness".

(5) Apply this to ARS 8-537(B): Person runs up to a police officer screaming, "She's beating her child!" or, "Yesterday, she beat her child!". The statute says the report must have been "ordered by the court", so the police officer's report here would not be admissible under the statute (maybe under the evrule). Suppose the same witness tells an investigating caseworker, "Yesterday, she beat her child!" The statute says the report is "admissible in evidence without objection." Is "trustworthiness" removed from the question of admissibility?

(6) It may be that counsel's remedy is to argue "trustworthiness" to the jury.

(7) See *State v. Taylor*, 306 Ariz. Adv. Rep. 3 (CA2 10/19/99), in which alleged child victim's statement to her mother 45 minutes after the incident was admissible, because the evidence showed she was so distraught before then that she couldn't even tell her father

about it; yet same child's video statement made to police 2 days later held inadmissible, both because inadmissible hearsay and because statute authorizing it (A.R.S. 13-4252) was unconstitutional.

The court stated specifically that

> Prior consistent statements 'may not be routinely admitted' to 'buttress the alleged victim's credibility . . .' [citing cases].

v. Many other exceptions are in *Evidence Rules 801* and following.

(1) Some require the "declarant" to be absent, some don't.
(2) Be not afraid: Put your finger right on the rule you are using, either to get the evidence in or to keep it out.

(3) If you're offering what someone said, don't muffle the offer because you don't know the rule of admissibility. Lay the foundation (Time, Place, Persons Present), then ask the witness: "What did he say?"

g. Not every report of out-of-court words is hearsay. The speaking of words may merely be an event, and may be reported the same as any other event.

i. Witness says: "I *heard* Smith *say* to Jones, 'Here is $1,000 for your car,' and I then *heard* Jones *say* to Smith, 'Thank you for the money; now here is the key to the car.'" This is an oral contract - created by speaking words. How else can we prove an oral contract except by having someone who heard the words say, "I heard it said ..."? Not hearsay. Admissible.

ii. Witness says, "I *heard* Jones *say*, 'I am Napoleon Bonaparte.'" This is offered to show - not that Jones actually *is* Napoleon Bonaparte - but that Jones is crazy. Not hearsay. Admissible.

iii. Watch this: Witness says, "I *heard* Smith *say* he saw Jones walking on the beach." Why does the witness say this? Does he want you to believe Jones was walking on the beach? Then we better have Smith here personally to swear him and watch him say so. Hearsay, unreliable gossip, inadmissible.

But: If Smith has said he doesn't know Jones, the statement will tend to show he *does* know Jones; not hearsay; admissible.

iv. Special rule on *admissions*: One party may always prove what his opponent has said (if relevant). So, for instance, the state may show a defendant's confession, even though the defendant may not be compelled to testify at trial.

(1) This includes a party's interrogatory answers, offered against him by an opponent. These answers (and questions) are merely read aloud to the jury.

(2) This includes a party's deposition, which may be used against him by an opponent. The usual scenario is a series of questions by cross-examining counsel like, "Didn't you give the following answers to the following questions in your deposition [reading Q's and A's]?" But under *Civil Rule 32*, an opponent may merely read the party's deposition (or portions) to the jury. (Of course, the parts read must be otherwise admissible.)

h. *Hearsay is testimony, and may be impeached as such.* EvRule 806, *State v. Hernandez*, 191 Ariz 553, 559 P.2d 810 (CA1). D's admissible *excited utterance* was impeached with prior felony convictions.

i. Dft offered his own 9-1-1 call, made twenty minutes after he shot victim, to prove self-defense, which is what he said on the call:

> "This guy came at me with two beer bottles. I didn't know what to do. I didn't want to [shoot him]. I didn't know what to do."

ii. Note, the call was testimonial, offered to prove Dft's self-defense version of the incident. It was *not* a "non-hearsay" call for help.

iii. Note, too, the statement was *not* admissible as a Rule 801 "admission of a party opponent"; such offer could only have been made by the *opponent* - the state.

iv. Dissent argued that the hearsay is admitted because it is reliable, and prior convictions are admitted to impeach reliability. Problem: we're talking about admissibility only; the jury still makes the finding of credibility. We don't admit hearsay ruling it credible-as-a-matter-of-law.

v. Incidentally, although the convictions were "prior" to the trial, they were "subsequent" to the murder of which Dft was convicted.

vi. Trial court, having weighed 609 admissibility of the convictions in the event D testified live, need not re-weigh them for their admissibility to impeach D's hearsay statement.

i. *Hearsay in Domestic Relations Cases: There is no exception for what the children say.* Father was allowed to testify that his mother told him that his child Michael said Mom hit Michael's sister, and that Michael had told him directly of other misconduct of Mom. Trial judge's concern for avoiding testimony by children is not justification for allowing the evidence, nor is his reason adequate that children aged 5 and 9 probably wouldn't fabricate "for purposes of trial." [Of course, they might fabricate for their own gain the inter-parental war; and there is no inherent reliability to their declarations.] *Higgins v. Higgins*, 296 Ariz. Adv. Rep 36 (CA1, 5/27/99)

III. FINAL THOUGHTS

A. Apply common sense.

B. We are only dealing with the flow of information.

C. Consider the following:

1. Organize the information you have in an order which will be persuasive; do not just put on evidence under the Mt. Everest Rule ("Because It Is There"); put the important, persuasive stuff first and last. On the defense, pick the points that defend, don't just argue against everything.

2. Have your evidence rules handy and in mind -- in your trial manual right with the information. These rules are simply tools for the orderly presentation of information. Use them as such.

3. Know the rule which supports your offer . . . or supports your objection. Cite. "I object under Evidence Rule ...".

4. Oh, and whenever you object or otherwise address the court...STAND UP!

5. Do not thank the judge for a ruling.